

# Labor News & Views

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## AS PROMISED

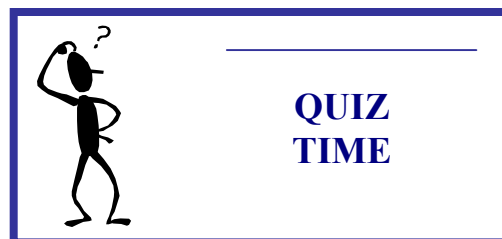
In our last issue of Labor News and Views we talked about Workplace Violence and actions that you should consider as a supervisor to prevent such an event in your workplace.

We promised we would talk about disciplining an employee for threatening someone. Most of this newsletter is dedicated to that topic. As you'll see, this is a very complex topic with many potential pitfalls.

It's our hope that you never have to deal with this type of situation. However, the realities are that you may be placed in this situation. If so, we highly encourage you to contact your Human Resources Office as early as possible. They'll be able to walk you through this complex situation.

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Mr. Metz received a performance rating at the end of the performance cycle. Believing he deserved better, Mr. Metz got upset and threatened harm to himself and others. He later repeated his threats to his supervisor who reported the threats to higher managers.

At a subsequent meeting with his supervisor and two other managers, Mr. Metz was asked to affirm his earlier statements. He did, but the questions and responses were vague.

Two of Mr. Metz's co-workers also reported he had stated threats to kill his superiors. The agency then fired him for threatening his superiors.

Was the Agency's action justified?

(See the following article)

## WHEN A THREAT IS NOT A "THREAT"

Mr. Metz appealed his removal to the local office of the Merit Systems Protection Board. The judge reversed the agency, finding that Mr. Metz's statements did not constitute "threats" because he didn't intend them as threats and the individuals didn't perceive them as threats.

The agency (Dept. of Transportation) appealed to the full Board who reversed the judge's earlier decision and upheld the removal. The Board held that the reactions of the listeners to whom the remarks were relayed were serious, that Mr. Metz repeated the remarks several times, and that employees who overheard the remarks reported them to management. The Board further found that the officials for whom the remarks were intended interpreted them as threats and responded appropriately by confirming the statements, holding meetings with Mr. Metz, obtaining an arrest warrant and ordering a fitness-for-duty examination.



## When is misconduct a "threat"?

Mr. Metz didn't give up and appealed to the Federal Circuit Court of Appeals. It was in their decision that the Court established the legal standard which must be used in evaluating these situations. The Court held that the agency must utilize the meaning that a *reasonable person* would give to the words in deciding whether or not a threat was made.

The Court identified five factors which are to be considered:

- (1) The listener's reaction;
  - (2) The listener's apprehension of harm;
  - (3) The speaker's intent;
  - (4) Any conditional nature of the statement's;
- and
- (5) The attendant circumstances.

Applying these factors to *Metz*, the Court noted that while the employees who heard the statements were concerned, they also said they didn't expect Mr. Metz to act on his remarks. One testified that Mr. Metz had casually mentioned the remarks to a friend who was a supervisor, and was later asked to make a statement. The other went camping for a week, came back, and came forward when he heard the agency wanted to penalize Mr. Metz. Under these circumstances, the Court overturned the

removal and ordered Mr. Metz returned to work with backpay.

A couple of other cases can help us get a better picture of what to do in this type of situation.

In *Daigle v. Dept. of Veterans Affairs*, Mr. Daigle was removed for a "threat to inflict bodily injury upon another agency employee and disrespectful conduct toward agency personnel." Apparently during the course of an EEO counseling session Mr. Daigle, while referring to the Medical Center Director, made comments to the effect that "if I wasn't a sane man, I'd take a weapon and blow the \$#%er's<sup>1</sup> brains out." The removal was overturned because the evidence was insufficient to sustain the charges. The agency failed to meet the factors found in *Metz*. An interesting twist to this case was the Board found that an EEO counseling session is semi-confidential and that employees should be given some leeway with regard to their conduct than they might otherwise be afforded in other employment situations. Needless to say, Daigle returned to work with backpay.

However, in *Facas v. US Postal Service*, the Board found a clear threat was posed when Mr. Facas said he was going to "butcher the Postmaster" and kill other employees. The employee to whom the remark was made and the Postmaster both testified they were alarmed by the remarks. The Postmaster reported the incident to postal inspectors and isolated himself in his office to avoid Mr. Facas. The next day, the Postmaster placed Mr. Facas on emergency suspension, had him removed from the premises, left instructions with subordinates they were to call the police if Mr. Facas returned, and filed a police report. The Board found Mr. Facas' remarks were not conditional, that he intended to follow through with his remarks, and that his removal was warranted.

**Got Ideas?** You can contact us at [nwlabor\\_nw@nw.hroc.navy.mil](mailto:nwlabor_nw@nw.hroc.navy.mil). We would enjoy hearing your ideas for our newsletter.



<sup>1</sup> Editor Comment: My apologies to anyone who may be offended by this rude comment.

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## WHEN IT'S NOT A THREAT

### SHOULD YOU CALL IT SOMETHING ELSE?

Threatening a supervisor or another employee is a serious disciplinary offense which can lead to removal. Whether or not an employee's remarks constitute a threat must be evaluated on a case basis using the five factors identified in *Metz*. Where such remarks do not rise to the level of a threat, disciplinary action may still be appropriate for "Insubordination" or "Use of Insulting, Abusive, or Obscene Language."

In a recent decision that came out of the Umpqua National Forest (that's near beautiful Roseburg Oregon for you non-natives), the Board sustained the removal of Ms. Mesberg for "making statements to a co-worker that caused anxiety and disruption in the workplace."

Ms. Mesberg, a single parent, was told she would be taking some required training and had arranged for childcare accordingly. Apparently the class was full so her supervisor sent her an email which stated she was rescheduled. The email arrived on a particularly stressful day in which a lot of bad personal things were happening in Ms. Mesberg's life. Ms. Mesberg saw this failure to provide timely notice of the rescheduling as an example of poor treatment received by the support staff in her work area. At the end of the day she told a co-worker "I don't make enough to count around here. I wish I had a gun." The co-worker was concerned and notified the supervisor. The supervisor tells upper management. The co-worker was so distressed that she contacted the Civilian Employee Assistance manager who recommended that she also get the law enforcement involved. Suddenly the co-worker gets a case of the guilts and, feeling like she needs to tell Ms Mesberg that she told their supervisor about the "gun" statement, confesses to Ms. Mesberg who responds "I wish I had a gun, I'd blow everyone away."

To make a long story short, Ms. Mesberg is placed on administrative leave and is escorted from the office by a law enforcement officer. At this time management holds a meeting with the members of the office who are told that Ms. Mesberg was removed from the workplace after making statements which were threatening. After the meeting the other office members are clearly shaken. The agency proposes Ms. Mesberg removal and it was upheld.

A key element here is this was not Ms. Mesberg's first misconduct since she was previously suspended for inappropriate conduct toward a coworker in which she displayed a knife and asked a coworker if he was afraid she could cut him.

Remember that they didn't use the word "threat" in the removal charge. Framing the charge is extremely important in these kinds of cases. You should consult with your Human Resources Office. Remember, if your charge cannot be sustained, the discipline will be overturned.

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## MANAGEMENT RIGHTS

### FACT OR MYTH?

5 US Code 7106(a) preserves to management the right:

- "(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
- "(2) in accordance with applicable laws –
  - (A) to hire, assign, direct, layoff and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
  - (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
  - (C) with respect to filling positions, to make selections for appointments from –

- (i) among properly ranked and certified candidates for promotion; or
- (ii) any other appropriate source; and
- (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.”

Sounds simple, doesn't it? Obviously Congress had great wisdom and foresight in passing this legislation to provide you with the tools needed to get your job done. You have the right to hire, fire, assign work to, promote, and discipline your employees. Not only do you not have to negotiate these rights with the union, but the law specifically precludes you from negotiating these rights away.

So, if you have the right to make these kinds of decisions, why does it seem like every time you make such a decision, you get blasted by the union or you've got that Human Resources Office telling you that you screwed up?

The law preserves to you the right to make these employment decisions. That right is not, however, an unfettered one. It carries with it some labor relations obligations. Just look a little farther down in the law to find Section 7106(b) that provides, “Nothing in this section shall preclude any agency and any labor organization from negotiating ...

“(2)<sup>2</sup> procedures which management officials of the agency will observe in exercising any authority under this section; or

“(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.”

While the law preserves the right, for example, to assign employees to overtime work, the procedures (i.e., voluntary versus a rotating basis) you use to determine which among several qualified bargaining unit employees will be

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<sup>2</sup> Section (1) doesn't apply to our discussion so it wasn't included

assigned such work is bargainable with the union. Bargaining of this nature is referred to as “Impact and Implementation (I&I) Bargaining.”

The law requires that when you make such decisions you must provide advance notice to the union and an opportunity to I&I bargain before you effect such decisions, *if the exercise of that decision changes the working conditions of bargaining unit employees, and if you have not previously bargained over such matters in the collective bargaining agreement.* For example, you may continue to select and assign employees to overtime work in accordance with previously established procedures without notifying the union. But if you intend to deviate from those previously established procedures (i.e., switch from a volunteer to a rotating basis) you are obligated to provide the union advance notification in accordance with the procedures defined in the collective bargaining agreement.

Some of the more common situations which might require union notification include overtime/shift assignments, changing hours/days of work, rearranging office spaces, and changing work duties. Who to call for advice? Your handy Human Resources Office will be more than happy to step you through this process.

TRAINING OPPORTUNITIES		
Date	Class	Location
5-8 Sept	Supervisor's Role in HR Management	HRSC
If interested, contact Code 30 at HRSC at 315-8143		

THIS NEWSLETTER IS INTENDED TO PROVIDE GENERAL INFORMATION ABOUT THE MATTERS DISCUSSED. THEY ARE NOT LEGAL ADVICE OR LEGAL OPINIONS ON ANY SPECIFIC MATTERS. FOR FURTHER INFORMATION REFER TO YOUR HUMAN RESOURCES ADVISOR.